IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE JURISDICTION
CRIMINAL APPEAL NO.170 OF 1989

Prakash Baburao Shelar,)
Age about 25 years,)
Occupation- Service,)
Residing at Room No.4,Building No.13,)
Sector No.21, Yamunagar, Pradhikaran,)
Nigadi, Pune.)
(At present in Central Prison,)
Yerwada, Pune.))..Appellant

Vs.

State of Maharashtra.)..Respondent

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Mrs.Revati Mohite-Dere for the Appellant.

Shri B.H.Mehta, APP for the Respondent.

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CORAM : R.M.S.KHANDEPARKAR &
P.V. KAKADE, JJ

DATED : 19TH JANUARY, 2005.

ORAL JUDGMENT : (PER P.V.KAKADE, J)

1. This is an appeal preferred by the appellant-accused against the judgment and order dated 22nd February, 1989 passed by the Additional Sessions Judge, Pune, in Session Case No.33 of 1988 holding the appellant guilty of commission for the offence

punishable under Section 302 of the Indian Penal Code and sentencing him to undergo imprisonment for life vide Section 235 of the Code of Criminal Procedure, 1973.

2. The prosecution case, in brief, is to the effect that the appellant-accused was married to the deceased on 1st June, 1985 at Pune, at which time the deceased was serving as Clerk at Shivaji Nagar Head Post Office, Pune, where as the accused was serving as a Clerk in the State Bank of India, Chinchwad Branch, Chinchwad, Pune. After the marriage, the accused and the deceased started residing at the residence of the parents of the accused located at Sindhunagar area of Nigadi. Both stayed in the joint family of the parents of the accused for about 5 to 6 months. Thereafter, the couple could not live with the parents of the appellant-accused, and therefore, they started residing separately. It is the prosecution case that thereafter the accused started ill-treating the deceased and started harassing her on trivial causes. The deceased some times used to inform her parents and the brother about the ill-treatment to which she was subjected by her in-laws whenever she used to visit her parents. Raghunath (PW 6), the father of the deceased, tried to pacify the accused and advised him

not to quarrel with his wife and requested them to spend happy life, but in vain. It is the further case of the prosecution that on 17th May, 1987, there was a marriage ceremony at the relative's place at Uruli. P.W.6 Raghunath was also invited for the marriage. He also said that the accused and the deceased had also gone to Uruli-kanchan on motor bike to attend the marriage ceremony. Vijay, the eldest brother of the deceased, was also present in the said marriage. It is the prosecution case that there was some quarrel between the couple at that place, and therefore, they returned to their home on the next day by noon time.

3. On the fateful day i.e. 18th May, 1987 in between 2.00 to 2.30 p.m., it is alleged that the accused poured kerosene on her person and lit it with match stick, as a result of which she was set ablaze and sustained burn injuries. At that time, the accused claimed that he was cleaning the motor bike outside the room. As a result of flames of the fire, the deceased sustained 98 per cent burn injuries to almost all parts of her body. She also came running outside the house probably to save her life. She also raised hue and cry which attracted the attention of the others from the adjoining building. The deceased, therefore, stopped near the place where the waste

water was spread. Hearing the commotion and hue and cry, the neighbour Geeta Gajanan Natu, P.W.4, and others gathered and the neighbours tried to douse the fire. Thereafter, the accused brought rickshaw and took the deceased to Lokmanya Hospital at Chinchwad. The accused at that time also informed the brother of the deceased about the incident, who in turn, informed the P.W.6 Raghunath, the father of the deceased about it. Thereafter, the doctor from Lokmanya Hospital gave preliminary treatment to the deceased and considering the injuries and percentage of the burns, advised to remove the patient to the other hospital. Hence, the accused person took his wife in burnt condition to Ruby Hall Clinic, Pune. P.W.6 and P.W.7, the father and brother of the deceased, respectively, also rushed from Lokmanya Tilak Hospital to Ruby Hall Clinic, where medical treatment was started. At the time of admission of the patient, P.W.3 Dr.Ranade recorded the history of the case of accidental burns, the patient was admitted and the treatment commenced. According to the prosecution, the deceased had made disclosure to her father at Lokmanya Tilak Hospital that it was the accused person who had poured the kerosene and set her on fire. Subsequent to the admission of the patient to Ruby Hall Hospital, Pune, the police were informed, who arranged for recording

of dying declaration. The P.W.2, the Special judicial Magistrate recorded the dying declaration of the deceased at 10.55 p.m. on that very day wherein the deceased has clearly stated that the accused person poured the kerosene and set her on fire. On that basis, the offence punishable under Section 307 of the Indian Penal Code was registered against the accused person who was put in the jail and the investigation was commenced in due course.

4. In the course of investigation, the panchanama of the scene of the offence was prepared in which, certain articles were seized by the Investigating Officer. Thereafter, the statement of the witnesses came to be recorded including the neighbours as well as the parents of the deceased and the other witnesses. The panchanama of seizure of clothes was also prepared. Ultimately, at about 2.50 p.m. on 22nd May, 1987, the deceased succumbed to her injuries and post mortem examination was conducted by the medical officer at Sassoon Hospital, Pune. The post mortem report is received and is a part of record. The offence under Section 302 of the Indian Penal Code was registered against the accused. The record of the earlier investigation was included in the papers. The seized articles were sent to the Chemical Analyser for

examination, whose report was received and is a part of record. On completion of the investigation, the charge sheet was sent to JMFC Court, Kirkee, for the offence under Section 302 of the Indian Penal Code. The learned Magistrate committed the case to the Sessions Court, Pune, as it was exclusively triable by the Sessions Court, Pune.

5. The charge was framed against the accused person to which he pleaded not guilty. The defence plea is of total denial of palpable participation. In other words, the defence version is that the deceased met with an accident while putting kerosene in the stove which flared up, as a result of which, she caught fire and died. According to the defence, it was the accused person who moved immediately and took the victim to the Lokmanya Hospital and thereafter to Ruby Hall Clinic, Pune, to make available the best possible treatment to save her life.

6. The prosecution led its evidence by examining as many as 10 witnesses including the police personnel, who have assisted the investigation. The trial Judge came to the conclusion on the available evidence that the prosecution had succeeded in establishing the guilt of the accused and has

consequently convicted him for the offence of murder of his wife and passed the sentence accordingly. Hence, the present Appeal.

7. At the outset, it must be noted that this is basically a case, balanced on the two dying declarations, and therefore, it would be just and proper on our part to assess the evidence of dying declarations in its proper perspective.

8. Before turning to the dying declarations, it must be noted that there is no doubt whatsoever that the deceased suffered un-natural death due to 100 per cent burn injuries which fact can be ascertained from the post mortem examination report and the cause of death mentioned therein which is not challenged by the defence. The moot question round which the case revolves is regarding the authorship of the crime. In other words, the question is, whether it is a homicide or accidental death.

. As per the prosecution version, after the incident took place at about 2.00 to 2.30 p.m. on the fateful day, the accused, who was in the house, rushed the victim to nearby Lokmanya Hospital at Chinchwad, where she was given medical first-aid. It is the

prosecution case that the accused immediately informed the P.W.6 Raghunath, father of the deceased, and P.W.7- brother of the deceased, who is also Doctor. The P.W.7 also rushed to Lokmanya Hospital to see the victim. In this regard, Raghunath (P.W.6), father of the deceased, has stated that his son Vilas telephonically informed him on 18th May, 1987 that Sunanda was burnt and admitted in Lokmanya Hospital and, therefore, he along with his wife and son rushed to Lokmanya Hospital and saw that Sunanda was completely burnt. Sunanda's father asked her how it had happened. She told her father that she committed a mistake and she could have run to her parental house. Similar is the version given by the P.W.7 Dr.Vilas, brother of the deceased, who has stated that when he asked to Sunanda about the burns, she replied that she had committed a mistake and it would have been better if she had run away earlier to her parental house and thereafter she kept mum. The witness has further stated that he again asked Sunanda what was the matter, to which she revealed that the accused poured the kerosene on her saree and lighted a match stick. According to the prosecution, this is the first oral dying declaration to her brother by the deceased.

. The 2nd dying declaration comes through the history recorded by the P.W.3 Dr.(Mrs.) Ranade at Ruby Hall Nursing Hospital when the Lokmanya Hospital authorities advised the accused and the parents of the deceased to remove her therefrom to the other hospital, where at the time of admission the history of the case from the deceased itself was recorded by the P.W.3., it was an accidental burns, Dr.Ranade (P.W.3) had testified to the same saying that when she asked Sunanda about the burns, she told that she caught fire by accident. This aspect was also recorded in the history document Exhibit-18, wherein Doctor has recorded that the history given was to the effect that the patient caught fire when she was putting the kerosene in the stove at 1.30 p.m. on that day and was taken to Lokmanya Hospital where she received the first-aid. This history came to be recorded at 6.00 p.m. on 18th May, 1987 which amounts to a dying declaration of the deceased.

. As per the prosecution case and the statement made by the Investigating Officer as well as the P.W.2 Special Judicial Magistrate, Pune, the Special Judicial Magistrate was called at the hospital at the instance of the police to record dying declaration and has recorded the dying declaration Exhibit-16 at 10.55

p.m. on that very day. The document Exhibit-16 shows that the deceased had stated to him that there was quarrel between the husband and the wife because of use of excess kerosene everyday, and therefore, in the course of quarrel, the accused poured the kerosene on her person from the can and lighted the match-stick on her person, as a result, she caught fire and thereafter she came out of the house in a burnt condition and the deceased herself extinguished the fire with water, and therefore, she had a grievance against her husband. This dying declaration supports the prosecution case in order to bring home the guilt. P.W.2 Dahiwal, Special Judicial Magistrate, has testified in his evidence that when he was called by the police at 10.30 p.m. at Ruby Hall Hospital, he completed formalities in respect of seeking medical opinion regarding condition of the patient and then proceeded to record dying declaration, Exhibit-16, under the supervision of the P.W.5 Dr.Desmeetsingh, who was present at the time of recording of the dying declaration. This aspect is also supported by Dr.Desmeetsingh stating that he was present throughout the time when the dying declaration, Exhibit-16, was recorded. He examined the patient and the patient was found fully conscious and well-oriented. After recording of the dying declaration was completed, he

again certified about the condition of the patient. In other words, the dying declaration, Exhibit-18, supported by the testimony of the P.W.2 Dahiwal, Special Judicial Magistrate, and P.W.5 - Dr.Dasmeetsingh, is found to be technically in proper form and, therefore, there is no reason to doubt about its procedural veracity.

9. In this regard, the learned Advocate for the defence vehemently urged that it was clear case of inconsistent dying declarations which was sufficient to raise doubt with regard to the veracity of the dying declaration, Exhibit-16, recorded by the Special Judicial Magistrate. She proceeded to demonstrate this aspect further with reference to various pieces of evidence including the dying declaration in the form of history recorded by Dr.(Mrs.) Sukanya Ranade of Ruby Hall Clinic, which was first in point of time, i.e.6.00 p.m., whereas the dying declaration Exhibit-16 was recorded 5 hours after the first dying declaration. This aspect was sought to be met by the learned APP on behalf of the prosecution submitting that in fact the first dying declaration is in the nature of oral statement which came through the P.W.7 Dr.Vilas, brother of the deceased to whom it was stated by the deceased that it was the accused who had

committed the crime and had poured the kerosene and set her on fire. In this regard, the testimony of Dr.Vilas, brother of the deceased, cannot be accepted as a gospel truth especially when it was evident that his statement under Section 161 of the Code of Criminal Procedure came to be recorded 7 days after the incident, and again admittedly, he had not disclosed the fact that Sunanda had named the accused person categorically to him in Lokmanya Hospital immediately or to anybody including his father and for the first time when his statement was recorded after one week. This conduct of Dr.Vilas raises suspicion regarding his credibility especially when we take into account his relations with the deceased. It is not the case of the prosecution that P.W.7 Dr.Vilas is a layman, in fact, he is a doctor, and the natural conduct would demand that he could have rushed to the police or contacted the police to name the accused. His evidence is silent on this aspect. If at all the name of the accused was infact revealed by Sunanda to her brother in Lokmanya Hospital, in all probability, the brother could have mentioned it to his father, who accompanied them at the same time. However, the evidence of P.W.6 Raghunath, as noted earlier, is totally silent on this aspect, and therefore, we are inclined to hold that the theory of the prosecution

cannot be accepted as true.

10. Then we come to the question of two inconsistent dying declarations. Nodoubt, if we peruse the dying declaration Exhibit-16 recorded by the P.W.2 Dahiwal, Special Judicial Magistrate in isolation, it is sufficient to pin down the accused person, however, it is needless to mention that such piece of evidence cannot be read in isolation to bring home the guilt of the accused especially when the other equally important circumstances are present on record in the presence of earlier dying declaration recorded in the first point of time. As noted earlier, the dying declaration in the form of history recorded by P.W.3 Dr.Sukanya Ranade is exactly contrary to the prosecution theory. It is significant to note that it was recorded at 6.00 p.m. There is no clear evidence on record to show that there was any element of pressure on Sunanda to state history in the said fashion hiding the fact that the accused was culprit who had committed crime. Moreover, there is absolutely no iota of evidence nor any whisper of circumstances to show as to why the testimony of Dr.Ranade should be disbelieved when she has categorically stated in her deposition that at about 6.00 p.m. on the fateful day, Sunanda gave history of

the accidental burnt. It is to be noted that the evidence of Dr.Ranade, P.W.3, must be accepted as true because she is totally disinterested person and has no concern whatsoever either with the deceased or with the accused. Therefore, we are of the view that the evidence of Dr.Ranade, P.W.3, cannot be disbelieved in any manner whatsoever and has to be accepted as truth in the present case.

. Once this position is reached, then the dying declaration Exhibit-16 recorded by the Special Judicial Magistrate, comes under scrutiny especially when it was recorded 5 hours subsequent to the earlier dying declaration.

11. The learned Advocate for the Appellant sought to rely upon several judgments of this Court as well as of the Apex Court in support of her contention that when there is an allegation of inconsistent dying declarations, as a rule, benefit of doubt should go in favour of the accused. In the case of **Smt.Kamla v. State of Punjab,** reported in AIR 1993 SC 374, the Apex Court held that the dying declaration should satisfy all the necessary tests and one such important test is that if there are more than one dying declarations, they should be consistent. In that case, there were

four dying declarations made by the deceased revealing glaring inconsistencies vis-a-vis naming the culprit. One of the dying declarations indicating the incidence as an accident was also present, and in the circumstances, it was held that the conviction under Section 302 of Indian Penal Code based on one of the dying declarations implicating the accused, could not be upheld and hence, the accused was entitled to get the benefit of doubt.

12. The support was also sought from the ruling of the Apex Court in the case of **Mohanlal Gangaram Gehani v. State of Maharashtra,** reported in AIR 1982 SC 839 wherein it was held that victim was stating the name of a particular person as his assailant to the doctor, who examined him and subsequently gave another name as assailant. In such cases, the statement made by the victim to the doctor being the first in point of time must be referred to his subsequent statement. In our considered view, this is what exactly happened in the present case. The version given to Dr.Ranade, P.W.3, vide Exhibit-18, is the version first in point of time given by the victim, as, contrary to the subsequent version given to the Special Judicial Magistrate, vide Exhibit-16, and therefore, we are inclined to accept the version given to P.W.3 Dr.Ranade especially when

the victim had no time either to concoct the story to save the accused person nor there were any circumstances to show that she was under pressure by anybody at the given time to hide the truth from Dr.Ranade at Ruby Hall Hospital at 6.00 p.m. on the relevant day. In this position, we accept the arguments advanced on behalf of the Appellant that in view of the two inconsistent dying declarations, it would not be safe to rely upon the dying declaration subsequently recorded by the Special Judicial Magistrate vide Exhibit-16 and benefit of doubt must go in favour of the accused in that regard.

13. Apart from this aspect, as we have found in the course of hearing, the entire investigation of the case is conducted in half-hazard and cursory manner. It must be noted that it is the prosecution case that the victim was firstly taken to the Lokmanya Hospital, Chinchwad, Pune, where she was given treatment. Needless to mention that the Lokmanya Hospital, Chinchwad, must be having record of treatment given to the patient. For that purpose, it was pointed out on behalf of the Appellant that during the course of trial, the application was made to the Court to call for the said record from the Lokmanya Hospital, as the same was not produced by the investigating machinery

as a part of record of the case. However, that record did not come before the Court. In all probability, in Lokmanya Hospital, history of the injuries might have been recorded by the concerned medical officer who gave the first aid to the victim. Had it been available for our perusal, it would have been definitely of much help to decide the case. However, it was not to be so only due to the omission on the part of the investigating machinery, and therefore, on such omission, the benefit of doubt has to go in favour the accused person.

. It is also the case of the prosecution that several neighbours were examined as witnesses, however, except P.W.4 Mrs.Geeta Natu, no other neighbour was examined especially when their role in dousing the fire was apparent throughout the case. The reason for not examining those witnesses is not available for us to consider the same, and therefore, that aspect also remains to be considered in this regard. The neighbour, who is examined, is not of much value for the present case. Admittedly, she was the person who came to her window, only after hearing the commotion and was busy in feeding her child and eventually she did not actually come out and see who had doused the fire and to ascertain the act and

conduct of the accused.

14. It was urged on behalf of the prosecution that there was a motive for the accused person to kill his wife. The so called motive is said to be that the accused was impotent and/or infertile and therefore, he was in a deranged state of mind and therefore, he killed his wife. There is absolutely no evidence in support of the so called motive. Moreover, if it is accepted as truth, in all probability, impotency of the accused cannot be the reason for the accused to kill his wife, and therefore, such submission regarding the motive cannot be accepted even for a moment for want of sufficient evidence as well as on the touchstone of probabilities.

15. For the reasons recorded above, we are satisfied that the Learned trial Judge has committed an error in arriving at the conclusion of the guilt of the accused especially when perusal of his judgment shows that it is silent on the point as to why he had discarded the evidence of P.W.3 Dr.Ranade. He has also not taken into consideration the fact that the statement of Dr.Vilas, P.W.7, was recorded by the

police after 7 days of the incident and till then, he had not revealed the name of the culprit to anybody. Inspite of this aspect, the learned trial Judge has put reliance upon the evidence of Vilas, P.W.7, which cannot be allowed in law. Therefore, we are of the view that the evidence on record is sufficient only to raise suspicion against the accused person, the suspicion howsoever cannot take place as proof and as such, we hold that the accused is entitled to get the benefit of doubt and therefore, is required to be acquitted on that count.

16. In the result, the Appeal is hereby allowed. The Judgment and Order dated 22nd February, 1989 passed by the Additional Sessions Judge, Pune, in Sessions Case No.33 of 1988 convicting the Appellant-accused for the offence punishable under Section 302 of the Indian Penal Code is hereby quashed and set aside. The Appellant-accused is acquitted of the charge u/s. 302 of Indian Penal Code. He is on bail and his bail bond stands cancelled forthwith.

(R.M.S.Khandeparkar, J)

(P.V.Kakade, J)